Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-64

In The

Supreme Court of the United States

October Term, 1988

STATE OF MISSOURI, et al.,

Petitioners,

vs.

KALIMA JENKINS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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STATEMENT

The National Association of Legal Assistants, Inc. submits this brief *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of respondents[1]. This brief is submitted upon the written consent of petitioners and respondents.[2]

INTEREST OF THE AMICUS CURIAE

Legal assistants[3] are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

National Association of Legal Assistants, Inc., Model Standards and Guidelines for Utilization of Legal Assistants (1984).

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[1] The National Association of Legal Assistants, Inc., submitted this brief, in substantially the same form, as *amicus curiae* in support of petitioner, in the case *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir.1987), *cert. granted*, 108 S.Ct.2869 (June 27, 1988)(No. 87-1485), currently pending before the Court.

[2] The original of petitioners' written consent by Bruce Farmer, Esquire, counsel for petitioners, and the original of respondents' written consent by Jay Topkis, Esquire, counsel for respondents, are being filed with the Clerk of the Court under separate cover.

[3] The term "legal assistant" is preferred, as it represents those persons doing work of a legal nature under the direct supervision of an attorney, as opposed to a broader category of persons termed "paralegal," who perform work of a similar nature but not necessarily under the supervision of an attorney.

The National Association of Legal Assistants, Inc. ("NALA") was incorporated in 1975 as a non-profit organization, in recognition of and response to the burgeoning use of legal assistants in the delivery of legal services throughout the United States. Representing some 8,000 legal assistants through individual membership or affiliated associations, NALA seeks to promote professional development and continuing education for legal assistants, and to provide a strong national voice to represent this growing and significant profession.[4]

Consistent with these goals, NALA, in 1975, adopted a Code of Ethics and Professional Responsibility for legal assistants to serve as a guideline for the proper conduct by legal assistants in the performance of their duties (reprinted in full in the Appendix to this brief). In 1976, NALA administered the first national legal assistant certification examination, testing skills basic to the profession as well as substantive knowledge of law and procedure. Currently, the voluntary two-day examination program is administered three times yearly. As of July, 1988, 2,327 participants have earned the title CLA (Certified Legal Assistant).

In 1984, NALA adopted its Model Standards and Guidelines for Utilization of Legal Assistants to serve as

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[4] Projections by the United States Department of Labor indicate an increase in the number of legal assistants from an estimated 53,000 in 1984 to 104,000 in 1995. United States Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Quarterly (Spring 1986).

a guide for legal assistants and supervising attorneys, by describing the role of a legal assistant in the delivery of legal services. Finally, NALA works hand in hand with local, state and national bar associations to set standards for legal assistants, and provides continuing education for legal assistants through seminars, workshops, publications and video tapes.

The legal assistant is a recognized and desirable addition to the modern law office. The delegation of work, which would otherwise be performed by an attorney, to a skilled legal assistant reduces the cost of legal services to the client and increases attorney efficiency and productivity. The benefits of this cost-reducing, cost-effective delivery of legal services to the public through the attorney-supervised use of legal assistants will be promoted and encouraged if the work of legal assistants is recognized and compensated at the market rate as part of court-awarded attorney's fees.

Were the Court to reverse the ruling below by holding that the time spent by legal assistants in the successful prosecution of a civil rights case should not be compensated at the market rate, under 42 U.S.C. § 1988, the detrimental effect upon those seeking legal representation to redress civil rights violations, as well as in other types of cases in which Congress has provided for the recovery of attorney's fees, would be substantial. Such a result would either discourage attorneys from representing victims of civil rights violations, because they could not receive full compensation for their effort, or force attorneys to perform all tasks of a legal nature, thereby decreasing the utilization of legal assistants and increasing the cost of litigation.

SUMMARY OF ARGUMENT

The widespread use of legal assistants by attorneys to perform work of a legal nature which would otherwise have to be performed by an attorney at a much higher rate has significantly reduced the cost of legal services to the public and enhanced the quality of legal representation by promoting efficient utilization of attorney time. Compensation for the attorney-supervised work of legal assistants at an hourly rate less than that charged by attorneys, but high enough to cover the cost of overhead associated with the work of a legal assistant, is customarily included in attorney's fees charged private fee-paying clients.

A reasonable attorney's fee awarded pursuant to the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, should include market rate compensation for productive work of a legal nature performed by a skilled legal assistant, under the supervision of an attorney, in order to effectuate the purpose of section 1988. Section 1988 was adopted by Congress to make available legal representation to victims of civil rights violations by fully compensating counsel for prevailing parties at a rate competitive with that charged in the private marketplace. An attorney's fee award which includes market rate compensation for the work of legal assistants is competitive with fees charged to traditional fee-paying clients, makes civil rights representation financially feasible for competent attorneys, promotes the cost-effective practice of utilizing legal assistants in the delivery of legal services and is in accord with the goal of making available efficient

and reasonably priced legal services, not only to victims of civil rights violations but also to the public at large.

ARGUMENT

THE WORK OF LEGAL ASSISTANTS IS COMPENSABLE AT THE MARKET RATE AS PART OF A REASONABLE ATTORNEY'S FEE AWARD PURSUANT TO 42 U.S.C. § 1988.

A. Compensating prevailing parties for the work performed by legal assistants on an hourly basis at the market rate comports with accepted practice in the private marketplace and is thus consistent with the purpose of 42 U.S.C. § 1988.

The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." On several occasions, the Court has visited the legislative history of section 1988, finding that the purpose of the Fees Act was to provide a remedy necessary to obtain compliance with civil rights laws, and to promote respect for civil rights through effective citizen enforcement thereof. *Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air*, 478 U.S.546, ___, 106 S.Ct.3088, 3096 (1986) (*"Pennsylvania I"*); *Evans v. Jeff D.*, 475 U.S.717, ___, 106 S.Ct.1531, 1539 (1986). Unless the attorney's fee reimbursement pursuant to section 1988 is *" 'full and complete'*, the statutory rights [created by civil rights legislation] would be meaningless because they would remain largely unenforced." *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air,*

107 S.Ct.3078, 3093 (1987) (Blackmun J., dissenting) (emphasis added) (*"Pennsylvania II"*).

Because most victims of civil rights violations are unable to afford legal representation, Congress found that the market itself would not provide adequate and effective access to the judicial process for vindication of rights violated. *Pennsylvania II*, 107 S.Ct. at 3092 (Blackmun J., dissenting); *City of Riverside v. Rivera*, 477 U.S.561, ___, 106 S.Ct.2686, 2695 (1986). Thus, to ensure that experienced competent attorneys would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case, at a rate mirroring the prevailing market rate in the relevant community. *Pennsylvania II*, 107 S.Ct. at 3095-96; *City of Riverside*, 477 U.S. at ___, 106 S.Ct. at 2696; *Evans*, 475 U.S. at ___, 106 S.Ct. at 1539; *Blum v. Stenson*, 465 U.S.886, 895 (1984). Reasonable section 1988 attorney's fees must be competitive with the private market for lawyers' services, *Pennsylvania II*, 107 S.Ct. at 3092, 3093, 3095 (Blackmun J., dissenting), and "similar to what 'is traditional with attorneys compensated by a fee-paying client.'" *Id.* at 3093 (citation omitted). *See also City of Riverside*, 477 U.S. at ___, 106 S.Ct. at 2695.

Attorneys in the private marketplace traditionally charge fee-paying clients for supervised work of a legal nature performed by legal assistants at a lesser hourly rate than that charged by attorneys. Separate billing for the services of such non-legal personnel as legal assistants and law students is an "increasingly widespread custom." *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir.1983).

> In the not so distant past the court would have frowned upon the practice of billing paraprofessional time separate from attorney time just as it might if a firm separately recorded and billed the hours spent by a secretary on a specific client . . . , but the standing of paraprofessionals has improved significantly as special training has enabled them to undertake a wide variety of more sophisticated tasks previously assigned exclusively to higher priced lawyers. The advent and widespread use of the paraprofessional has meant that the cost of effective legal counsel has been reduced and its availability enhanced without impairing the quality or delivery of legal services.

In re Chicken Antitrust Litigation, 560 F.Supp.963, 977-78 (N.D.Ga.1980) (citation omitted). *See also Parise v. Riccelli Haulers, Inc.*, 672 F.Supp.72 (N.D.N.Y.1987). That attorney's fees include compensation for time spent by legal assistants reflects "the realities of the marketplace and of modern, progressive law office management." *United Nuclear Corp. v. Cannon*, 564 F.Supp.581, 589 (D.R.I.1983).

This court implicitly recognized and encouraged the traditional marketplace use of non-lawyer personnel in the delivery of legal services by approving an award of attorney's fees, pursuant to section 1988, which included compensation for time spent by a law clerk. *City of Riverside*, 477 U.S. at ___, 106 S.Ct. at 2690. Every federal circuit has likewise acknowledged the validity of delegating work of a legal nature to non-lawyer personnel under the supervision of an attorney by compensating for the

work of legal assistants or law clerks pursuant to section 1988,[5] or to an analogous fee-shifting statute or rule.[6]

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[5] First Circuit: *Jacobs v. Mancuso*, 825 F.2d 559, 563 (1st Cir.1987); *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir.1980); Third Circuit: *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir.1987) (fee reductions would be approved for work which should have been performed by paralegals); Fourth Circuit: *Vaughns v. Board of Educ. of Prince George's County*, 770 F.2d 1244, 1245-46 (4th Cir.1985); Fifth Circuit: *Heath v. Brown*, 807 F.2d 1229, 1232 (5th Cir.1987); Sixth Circuit: *Stewart v. Rhodes*, 656 F.2d 1216, 1217 (6th Cir.1981), *cert. denied*, 455 U.S.991 (1982); *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir.1979), *cert. denied*, 447 U.S.911 (1980); Seventh Circuit: *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir.1988); *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir.1984), *cert. denied*, 469 U.S.1106 (1985); Eighth Circuit: *Jenkins v. Missouri*, 838 F.2d 260, 266 (8th Cir.), *cert. granted in part*, 109 S.Ct.218 (Oct. 11, 1988)(No. 88-64), and *cert. denied*, 109 S.Ct.218 (1988); Ninth Circuit: *Keith v. Volpe*, 833 F.2d 850, 859 (9th Cir.1987); *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir.1987); Tenth Circuit: *Lucero v. City of Trinidad*, 815 F.2d 1384, 1385 (10th Cir.1987); *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir.1983); Eleventh Circuit: *Walters v. City of Atlanta*, 803 F.2d 1135, 1151 (11th Cir.1986)

[6] Second Circuit: *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 238 (2d Cir.), *cert. denied*, 108 S.Ct.289 (1987) (class action); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir.1974) (anti-trust class action); Third Circuit: *Brinker v. Guiffrida*, 798 F.2d 661, 668 (3d Cir.1986) (recovery for law clerk under Equal Access to Justice Act); *Citizen's Council of Del. County v. Brinegar*, 741 F.2d 584, 596 (3d Cir.1984) (Equal Access to Justice Act); Fourth Circuit: *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 974 (4th Cir.1987) (law clerk under Fair Credit Reporting Act, 15 U.S.C. § 1681); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 339-40 n.28 (4th

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Cir.1983), *cert. denied*, 466 U.S.951 (1984) (employment discrimination); Fifth Circuit: *Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc.*, 835 F.2d 541, 546 (5th Cir.1987); *Alter Fin. Corp. v. Citizens & Southern Int'l Bank of New Orleans*, 817 F.2d 349, 350 (5th Cir.1987) (sanctions, 28 U.S.C. § 1927); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S.1009 (1983) (Title VII sex discrimination class action); Sixth Circuit: *Chandler v. Secretary of Dept. of Health & Human Services*, 792 F.2d 70, 73 (6th Cir.1986) (Social Security Act, 42 U.S.C. § 406); Seventh Circuit: *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d 601, 609 (7th Cir.1986), *cert. denied*, 108 S.Ct.82 (1987) (employment discrimination action, 42 U.S.C. § 2000e); *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1249-50 (7th Cir.1982), *aff'd*, 465 U.S.752 (1984) (anti-trust, 15 U.S.C. § 1 *et seq.*); Eighth Circuit: *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 817 (8th Cir.1983) (employment discrimination, 42 U.S.C. § 2000e); Ninth Circuit: *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir.1982) (employment discrimination, 42 U.S.C. § 2000e); *Todd Shipyards Corp. v. Director, Office of Workers' Compensation*, 545 F.2d 1176, 1182 (9th Cir.1976) (Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 n.19 (9th Cir.1975), *cert. denied*, 425 U.S.959 (1976) (anti-trust, 15 U.S.C. § 1 *et seq.*); Tenth Circuit: *Kopunec v. Nelson*, 801 F.2d 1226, 1229 (10th Cir.1986) (Equal Access to Justice Act); Eleventh Circuit: *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982) (employment discrimination, 42 U.S.C. § 2000e); D.C. Circuit: *Wilkett v. Interstate Commerce Comm'n*, 844 F.2d 867, 877 (D.C.Cir.1988) (law clerk; Equal Access to Justice Act); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 n.7 (D.C.Cir.1987) *(en banc)* (Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201).

B. Compensating for the work of legal assistant time on an hourly basis at the market rate promotes the cost-effective delivery of legal services and enhances the quality of legal services.

Compensating for the work of legal assistant time as attorney's fees under Section 1988 "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir.1984), *cert. denied*, 469 U.S.1106 (1985). Skilled legal assistants are capable of performing some work of a legal nature which would otherwise have to be done by an attorney. To the extent that such work is done by supervised legal assistants at substantially less cost per hour than would have been the case had the work been done by attorneys, the overall cost of legal services to the public is reduced. A rule prohibiting recovery for legal assistant time at the market rate would discourage the cost-effective delivery of legal services.[7]

In addition to reducing the cost of litigation, the use of legal assistants enhances the quality of legal representation. Legal assistants enable the attorney to spend his or her more costly time for greater productivity in more important areas where judgment and decision-making

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[7] *See, e.g., Jacobs*, 825 F.2d at 563 Spray-Rite Serv. Corp., 684 F.2d at 1250; *Todd Shipyards Corp.*, 545 F.2d at 1182; *Shorter v. Valley Bank & Trust Co.*, 678 F.Supp.714, 724 (N.D.Ill.1988); *Royal Crown Cola Co. v. Coca-Cola Co.*, 678 F.Supp.875, 880 (M.D.Ga.1987); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp.77, 83 (N.D.Cal.1978).

are required. The availability of legal assistants also promotes more thorough trial preparation by permitting a more efficient and economical utilization of staff time. *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp.77, 83 (N.D. Cal.1978). *See also Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1176, 1182 (9th Cir.1976); *Beamon v. City of Ridgeland, Miss.*, 666 F.Supp. 937, 946 (S.D.Miss.1987).

Law firms in the private marketplace routinely include an hourly rate charge for legal assistants as part of the attorney's fee charged fee-paying clients. Indeed, seventy-seven percent of 1,800 legal assistants responding to a recent survey indicated that their law firm received compensation for their work from clients on an hourly billing rate basis. National Association of Legal Assistants, Inc., 1988 National Utilization and Compensation Survey Report (1989). "Law firms, like other businesses that sell time, must set their hourly rates at an amount greater than that needed to pay their attorneys' or paralegals' salaries; they must figure into those rates all their costs of doing business." *In re Burlington Northern Inc. Employment Practices Litig.*, 810 F.2d 601, 609 (7th Cir.1986), *cert. denied*, 108 S.Ct.82 (1987). The hourly rate of legal assistants must reflect not only base salary, but also fringe benefits and a proportionate share of firm overhead.[8] Additionally, the routine practice of law

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[8] *See Schwartz v. Novo Industri A/S*, 119 F.R.D.359, 365 (S.D.N.Y.1988) (citation omitted). *See also Williams v. Bowen*, 684 F.Supp.1305, 1308 (E.D.Pa.1988); *Garmong v. Montgomery County*, 668 F.Supp.1000, 1011 (S.D.Tex.1987); *Brewer v. Southern Union Co.*, 607 F.Supp.1511, 1528 (D.Colo.1984).

firms seeking reimbursement for the work of legal assistants at a rate sufficient to cover both the "actual cost" and overhead costs associated with that legally related work is a fairer billing procedure.

> Unlike the work of secretaries and other supporting personnel, . . . the work of paralegals and law clerks is ordinarily charged directly to particular litigation and is therefore a clearly identifiable cost. Were it to be treated as an overhead expense, payable out of the general receipts of the attorney, the across-the-board cost of services to the attorney's clients generally would be burdened by paralegal costs incurred in connection with particular matters of no interest or benefit to other clients.

Chapman, 456 F.Supp. at 82.

Consistent with the private billing procedure, a majority of federal trial and appellate courts approve compensation of legal assistant work hours, as well as the legally related work of other non-attorneys such as law clerks, based upon a reasonable hourly rate set lower than the hourly rate of attorneys but higher than the "actual cost" and sufficient to defray the cost of overhead. *See Jacobs v. Mancuso*, 825 F.2d 559, 563 n.6 (1st Cir.1987) (legal assistant expenses are most frequently reimbursed based on an hourly fee).[9] This Court, in *City*

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[9] *See also, e.g., Ustrak*, 851 F.2d 983; *Wilkett*, 844 F.2d at 877; *Save Our Cumberland Mountains, Inc.*, 826 F.2d at 54 n.7; *Toussaint*, 826 F.2d at 904; *Jacobs*, 825 F.2d at 563 & n.6; *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 230, 238; *Lucero*, 815 F.2d at 1386; *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d at 609; *Heath*, 807 F.2d at 1232; *Kopunec*, 801 F.2d at 1229; *Citizen's Council of Del. County*, 741 F.2d at 596;

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of Riverside, supra, approved an attorney's fee award which included compensation for time spent by a student law clerk, at the rate of twenty-five dollars an hour, clearly more than the actual wages paid to the individual, and obviously high enough to cover the overhead costs associated with the non-lawyer employee. *See* 477 U.S. at ___, 106 S.Ct. at 2690 & n.2.[10]

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Richardson, 709 F.2d at 1023; *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 273 (6th Cir.1983); *Strama v. Peterson*, 689 F.2d 661, 663 (7th Cir.1982); *Stewart v. Rhodes*, 656 F.2d at 1216-17; *Todd Shipyards Corp.*, 545 F.2d at 1182.

[10] To highlight the need for this Court's guidance, several courts have allowed the recovery of compensation for the work of legal assistants or law clerks based on an hourly-rate while at the same time calling it compensation for "expenses," rather than attorney's fees. *See In re "Agent Orange" Product Liab. Litig.*, 818 F.2d at 238; *Yaris v. Special School Dist. of St. Louis County*, 661 F.Supp.996, 1002, 1003 n.9 (E.D.Mo.1987); *PPG Industries, Inc. v. Celanese Polymer Specialties Co.*, 658 F.Supp.555, 560, 565 (W.D.Ky.1987), *rev'd on other grounds*, 840 F.2d 1565 (Fed.Cir.1988). Some courts have held that law firms may only recover their paralegal "out of pocket" expenses, *see Thornberry*, 676 F.2d at 1244 (citing *Northcross*, 611 F.2d at 639), while others have permitted reimbursement for salary actually paid to a legal assistant, with no additional compensation for fringe benefits or overhead. *See, e.g., City of Detroit*, 495 F.2d at 473; *Illinois Migrant Council v. Pilliod*, 672 F.Supp.1072, 1084 (N.D.Ill.1987); *Campaign for a Progressive Bronx v. Black*, 631 F.Supp.975, 983 (S.D.N.Y.1986). Still others refuse to provide separate compensation for the work of legal assistants, taking the position that legal assistants represent overhead, such as clerical and office expenses, all covered by the attorney's hourly rate. *See Abrams v. Baylor College of Medicine*, 805 F.2d 528, 535 (5th Cir.1986); *Roe v. City of Chicago*, 586 F.Supp.513, 516 & n.6 (N.D.Ill.1984)

C. The inclusion of compensation for legal assistants in an attorney's fee award does not offend ethical and legal tenets prohibiting the unauthorized practice of law.

Any objection to including compensation for the supervised legally-related work of legal assistants in a reasonable attorney's fee award because legal assistants are not attorneys is but a "technical" one. The work performed by legal assistants is work of the type necessary to the prosecution of the litigation which would otherwise be performed by attorneys. Indeed, this Court has recognized the validity of non-lawyer personnel performing services of a legal nature. In *Procunier v. Martinez*, 416 U.S.396 (1974), the Court affirmed the striking of a prison administrative rule banning attorney-client interviews conducted by law students or legal paraprofessionals as constituting an unjustified restriction on the right of access to the courts. The Court agreed with the trial court's finding that prohibiting the use of law students or other paraprofessionals from conducting attorney-client interviews with prisoners would inhibit adequate professional representation of indigent inmates, or alternately, increase the cost of legal representation for prisoners. *Id.* at 419-20. Likewise, in *Johnson v. Avery*, 393 U.S.483 (1969), the Court struck down a prison regulation prohibiting any inmate from advising or assisting another in the preparation of legal documents. The Court noted that "the type of activity involved here – preparation of petitions for post-conviction relief – though historically and traditionally one which may benefit from the services of a trained and dedicated lawyer, is a function often, perhaps generally, performed by a layman." *Id.* at 490 n.11. *See also City of Riverside*, 477 U.S. at ___, 106 S.Ct. at

2690 (affirming attorney's fee award which included compensation for work performed by a law clerk).

Compensation for lawyer-supervised legally-related work performed by legal assistants conforms with the ethical canons and disciplinary codes governing lawyers and legal assistants. Lawyers are obligated to keep fees in check and take steps to provide efficient, cost-effective legal services. *See* ABA Model Code of Professional Responsibility EC 2-18 and DR 2-106(A)(B) (1976); ABA Model Rules of Professional Conduct, Rule 1.5(a) (1984). The delegation of tasks to lay persons is proper "if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently." Model Code EC 3-6. *See also* Model Rules, Rule 5.3.[11] Because the lawyer, or law firm, is the recipient of an attorney's fee for legal services and not the salaried legal assistant, the inclusion of compensation for the supervised work of a legal assistant as part of a reasonable attorney's fee does not offend ethical rules prohibiting attorneys from sharing legal fees with laymen. *See* Model Code EC 3-8 and DR 3-102.

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[11] The American Bar Association emphasizes that the work of a legal assistant "involves the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistance, the attorney would perform the task." ABA Standing Committee on Legal Assistants, Position Paper on the Question of Licensure or Certification (1986)

Legal assistants recognize the ethical ramifications of their performance of legally-related work, and emphasize, in self-policing ethics codes and guidelines, that legal assistants shall not undertake tasks which are required to be performed by an attorney, such as setting fees, giving legal advice, or appearing in any way to a court, the client, or the public to be practicing law.[12] Additionally, the rules stress that all work of a legal nature performed by a legal assistant must be delegated and supervised by an attorney, who retains ultimate responsibility to the client and assumes full professional responsibility for the work product. National Association of Legal Assistants, Inc., Code of Ethics and Professional Responsibility (1975, as amended through 1988); National Association of Legal Assistants Model Standards and Guidelines for Utilization of Legal Assistants (1984) (both reprinted in full in the Appendix to this brief). It is the close supervision by an attorney which keeps the legally-related work of a legal assistant from treading upon the

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[12] Though the American Bar Association has shied away from defining what constitutes the practice of law, ABA Code of Professional Responsibility, it notes that "[f]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer." ABA Model Code of Professional Responsibility EC 3-5 (1976). Courts faced with the question have attempted to craft a definition. For example, the Florida Supreme Court has stated that the giving of advice and the performance of services which affect important rights of a person under the law, and require legal skill and knowledge of the law greater than that possessed by the average citizen, constitutes the practice of law. *The Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1191 (Fla. 1978).

prohibited and unacceptable unauthorized practice of law, and makes the work of a legal assistant no more than an extension of the work of an attorney at a less costly rate.[13]

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[13] Courts awarding attorney's fees for the supervised work of legal assistants have delineated examples of legal services which would otherwise be performed by an attorney, and thus which are compensable if performed by a legal assistant. They include: investigation of the facts relating to the action, *In re Gas Meters Antitrust Litig.*, 500 F.Supp.956, 969 (E.D.Pa.1980); assisting with discovery, including such tasks as statistical and financial analysis, inspection and production of documents, review of answers to interrogatories, and the compilation of statistical and financial data, *Bagel Inn, Inc. v. All Star Dairies*, 539 F.Supp.107, 111 (D.N.J.1982); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 967; *see also, e.g., Richardson*, 709 F.2d at 1023; *Spray-Rite Service Corp.*, 684 F.2d at 1250; doing legal research, *Morgan v. Nevada Board of State Prison Comm'rs*, 615 F.Supp.882, 885 (D.Nev.1985); locating and interviewing witnesses, *Richardson*, 709 F.2d at 1023; *Garmong*, 668 F.Supp. at 1011; organizing and communicating with class members, *Richardson, supra; Edmonds v. United States*, 658 F.Supp.1126, 1136 (D.S.C.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 970; assisting with preparation for deposition and trial, and organizing exhibits, *Easter House v. State of Illinois, Dept. of Children and Family Services*, 663 F.Supp.456, 460 (N.D.Ill.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 972; assisting with preparation of settlement and settlement administration, *In re Chicken Antitrust Litig.*, 560 F.Supp.963, 978 (N.D.Ga.1980); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 967, 972; compiling statistical and financial data, *Bagel Inn, Inc.*, 539 F.Supp. at 111; drafting pleadings, *Parise v. Riccelli Haulers, Inc.*, 672 F.Supp.72, 75 (N.D.N.Y.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 969; and checking legal citations, *Beamon v. City of Ridgeland, Miss.*, 666 F.Supp.937, 943 (S.D.Miss.1987).

D. Courts scrutinize attorney's fee applications to assure the hourly rates of legal assistants and the time spent and nature of the work performed by legal assistants are all reasonable.

Courts compensating for the work performed by a legal assistant in connection with the award of a reasonable attorney's fee scrutinize the reported hours, the suggested rate, and the nature of the work performed in the same manner they scrutinize lawyer time and rates. *See Pennsylvania I*, 478 U.S. at ___, 106 S.Ct. at 3098; *Hensley v. Eckerhart*, 461 U.S.424, 434 (1983); *Ramos*, 713 F.2d at 559. Trial courts determine what portion of the work is of a clerical nature and is thus absorbed as part of the office overhead reflected in the attorney's billing rate and what portion of the work performed by the legal assistant constitutes legal services traditionally done by an attorney and which would otherwise be performed by an attorney at a costlier rate. *Ramos*, 713 F.2d at 558; *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S.1009 (1983). "Such expenses are separately recoverable only as part of a prevailing party's award for attorney's fees and expenses, and even then only to the extent that the paralegal performs work traditionally done by an attorney. Otherwise, paralegal expenses are separately unrecoverable overhead expenses." *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir.Unit B 1982).

Indeed, when considering a reasonable attorney's fee award, courts have chastised attorneys for doing work which more properly could have been delegated to a legal assistant under the attorney's supervision, and have penalized the attorney by lowering the hourly rate charged.

> It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir.1974). Wasteful utilization of expensive legal talent for work that may be delegated to non-lawyers is not condoned. "Routine tasks, if performed by senior partners in large firms, should not be billed at their usual rates. A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir.1983). Accordingly, courts regularly reduce an attorney's hourly rate to that traditionally charged for a legal assistant, to reflect the nature of the legal work performed.[14]

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[14] *See, e.g., Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S.546, ___, ___, 106 S.Ct.3088, 3092, 3099 (1986) (*"Pennsylvania I"*) (approving a lodestar which set different hourly rates for legal work requiring varying degrees of legal ability); *Daggett v. Kimmelman*, 811 F.2d at 799 (attorney hours devoted to tasks which should have been performed by associates or paralegals would warrant an hourly fee reduction); *Northcross*, 611 F.2d at 637, (necessary services performed by attorneys which could have reasonably been performed by less expensive personnel may be compensated at a lower rate than attorney's normal billing rate); *Drez v. E. R. Squibb & Sons, Inc.*, 674 F.Supp.1432 (D.Kan.1987) (dropping attorney billing rate to law clerk rate where three attorneys sat through trial); *Beamon*, 666 F.Supp. at 941-42 (attorney fees for purely clerical

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E. Permitting recovery for work of legal assistants promotes the availability of legal representation to victims of civil rights violations.

If the lawyer attempts to absorb the cost of the legal assistant into his or her regular hourly rate as an overhead expense, as is done for clerical work and office supplies, or to absorb the overhead costs associated with the work of a legal assistant, then all persons employing that attorney, including victims of civil rights violations, would suffer a higher hourly rate, regardless of whether their case necessitated the assistance of a legal assistant. More likely, the work currently performed by legal assistants would be done by attorney associates and billed at the higher attorney associate rate, clearly decreasing the utilization of legal assistants and increasing the cost of litigation. The attorney performing legal tasks which could be delegated to a legal assistant, however, faces the risk that his or her fee will be reduced by a court as being unreasonably high for the quality of work performed. The only remaining alternative would be for the attorney

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work which is easily delegable granted at reduced hourly rate); *Skelton v. General Motors Corp.*, 661 F.Supp.1368, 1385 (N.D.Ill.1987) (court reduces time of attorney spent on administrative tasks); *Metro Data Systems, Inc. v. Durango Systems, Inc.*, 597 F.Supp.244, 246 (D.Ariz.1984) (gathering information and drafting answers to interrogatories not recoverable by attorney as work which could have been performed by paralegal).

to perform the work at a reduced rate, below and not competitive with the market rate. Such a result would make the representation of victims of civil rights violations cost prohibitive and unattractive, and discourage competent, experienced attorneys from undertaking such representation because they could not receive full compensation for their efforts.

The widespread practice of assigning less technical yet legal work to legal assistants to be performed under the supervision of an attorney promotes economy and efficiency in the administration of justice. Permitting reasonable compensation for such services at the market rate as part of a reasonable attorney's fee encourages this desirable practice, and makes legal representation more readily available to victims of civil rights violations, in accord with Congress' intent when adopting the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988.

CONCLUSION

For the reasons set forth above, the National Association of Legal Assistants, Inc., as *amicus curiae*, respectfully urges the Court to affirm the decision of the Court of Appeals for the Eighth Circuit and permit recovery for the work of legal assistants at the market rate as part of a reasonable attorney's fee award made pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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APPENDIX

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CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY

It is the responsibility of every legal assistant to adhere strictly to the accepted standards of legal ethics and to live by general principles of proper conduct. The performance of the duties of the legal assistant shall be governed by specific canons as defined herein in order that justice will be served and the goals of the profession attained. The canons of ethics set forth hereafter are adopted by the National Association of Legal Assistants, Inc., as a general guide and the enumeration of these rules does not mean there are not others of equal importance although not specifically mentioned.

Canon 1. A legal assistant shall not perform any of the duties that lawyers only may perform nor do things that lawyers themselves may not do.

Canon 2. A legal assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a direct relationship with the client, and assumes full professional responsibility for the work product.

Canon 3. A legal assistant shall not engage in the practice of law by accepting cases, setting fees, giving legal advice or appearing in court (unless otherwise authorized by court or agency rules).

Canon 4. A legal assistant shall not act in matters involving professional legal judgment as the services of a lawyer are essential in the public interest whenever the exercise of such judgment is required.

Canon 5. A legal assistant must act prudently in determining the extent to which a client may be assisted without the presence of a lawyer.

Canon 6. A legal assistant shall not engage in the unauthorized practice of law.

Canon 7. A legal assistant must protect the confidence of a client, and it shall be unethical for a legal assistant to violate any statute now in effect or hereafter to be enacted controlling privileged communications.

Canon 8. It is the obligation of the legal assistant to avoid conduct which would cause the lawyer to be unethical or even appear to be unethical and loyalty to the employer is incumbent upon the legal assistant.

Canon 9. A legal assistant shall work continually to maintain integrity and a high degree of competency throughout the legal profession.

Canon 10. A legal assistant shall strive for perfection through education in order to better assist the legal profession in fulfilling its duty of making legal services available to clients and the public.

Canon 11. A legal assistant shall do all things incidental, necessary or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

Canon 12. A legal assistant is governed by the American Bar Association Model Code of Professional Responsibility, and the American Bar Association Model Rules of Professional Conduct.

NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC.

MODEL STANDARDS AND GUIDELINES FOR UTILIZATION OF LEGAL ASSISTANTS

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PREAMBLE

Proper utilization of the services of legal assistants affects the efficient delivery of legal services. Legal assistants and the legal profession should be assured that some measures exist for identifying legal assistants and their role in assisting attorneys in the delivery of legal services. Therefore, the National Association of Legal Assistants, Inc., hereby adopts these Model Standards and Guidelines as an educational document for the benefit of legal assistants and the legal profession.

DEFINITION

Legal assistants* are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

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* Within this occupational category some individuals are known as paralegals.

STANDARDS

A legal assistant should meet certain minimum qualifications. The following standards may be used to determine an individual's qualifications as a legal assistant:

1. Successful completion of the Certified Legal Assistant (CLA) examination of the National Association of Legal Assistants, Inc.; (see attached Exhibit A)

2. Graduation from an ABA approved program of study for legal assistants;

3. Graduation from a course of study for legal assistants which is institutionally accredited but not ABA approved, and which requires not less than the equivalent of 60 semester hours of classroom study;

4. Graduation from a course of study for legal assistants, other than those set forth in (2) and (3) above, plus not less than six months of in-house training as a legal assistant;

5. A baccalaureate degree in any field, plus not less than six months in-house training as a legal assistant;

6. A minimum of three years of law-related experience under the supervision of an attorney, including at least six months of in-house training as a legal assistant; or

7. Two years of in-house training as a legal assistant.

For purposes of these standards, "in-house training as a legal assistant" means attorney education of the employee concerning legal assistant duties and these guidelines. In addition to review and analysis of assignments, the legal assistant should receive a reasonable

amount of instruction directly related to the duties and obligations of the legal assistant.

GUIDELINES

These guidelines relating to standards of performance and professional responsibility are intended to aid legal assistants and attorneys. The responsibility rests with an attorney who employs legal assistants to educate them with respect to the duties they are assigned and to supervise the manner in which such duties are accomplished.

Legal assistants should:

1. Disclose their status as legal assistants at the outset of any professional relationships with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public;

2. Preserve the confidences and secrets of all clients; and

3. Understand the attorney's Code of Professional Responsibility and these guidelines in order to avoid any action which would involve the attorney in a violation of that Code, or give the appearance of professional impropriety.

Legal assistants should not:

1. Establish attorney-client relationships; set legal fees; give legal opinions or advice; or represent a client before a court; nor

2. Engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law.

Legal assistants may perform services for an attorney in the representation of a client, provided:

1. The services performed by the legal assistant do not require the exercise of independent professional legal judgment;
2. The attorney maintains a direct relationship with the client and maintains control of all client matters;
3. The attorney supervises the legal assistant;
4. The attorney remains professionally responsible for all work on behalf of the client, including any actions taken or not taken by the legal assistant in connection therewith; and
5. The services performed supplement, merge with and become the attorney's work product.

In the supervision of a legal assistant, consideration should be given to:

1. Designating work assignments that correspond to the legal assistant's abilities, knowledge, training and experience;
2. Educating and training the legal assistant with respect to professional responsibility, local rules and practices, and firm policies;
3. Monitoring the work and professional conduct of the legal assistant to ensure that the work is substantively correct and timely performed;
4. Providing continuing education for the legal assistant in substantive matters through courses, institutes, workshops, seminars and in-house training; and
5. Encouraging and supporting membership and active participation in professional organizations.

Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's Code of Professional Responsibility, and within the preceding parameters and proscriptions, a legal assistant may perform any function delegated by an attorney, including, but not limited to the following:

1. Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervision of the attorney.
2. Locate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant.
3. Conduct investigations and statistical and documentary research for review by the attorney.
4. Conduct legal research for review by the attorney.
5. Draft legal documents for review by the attorney.
6. Draft correspondence and pleadings for review by and signature of the attorney.
7. Summarize depositions, interrogatories, and testimony for review by the attorney.
8. Attend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney.
9. Author and sign letters provided the legal assistant's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.

EXHIBIT A

To become eligible to sit for the Certified Legal Assistant (CLA) examination, candidates must meet one of the following requirements:

1. Graduation from an ABA approved legal assistant training course or graduation from a legal assistant training course at a school which is institutionally accredited;
2. Graduation from a legal assistant course neither approved by the ABA nor at an institutionally accredited school plus two (2) years experience as a legal assistant;
3. A bachelor's degree in any field plus one (1) year experience as a legal assistant;
4. Seven (7) years law related experience under the supervision of a member of the bar (Note: This optional requirement is open through December 31, 1991.).

Once admitted to the program, the applicant must successfully complete an eleven hour examination covering general skills required of all legal assistants plus knowledge of four substantive areas of the law.

The CLA designation is for a period of five years and if the CLA submits proof of continuing education in accordance with the stated requirements, the certificate is renewed for another five years. Lifetime certification is not permitted.

CLA is a service mark duly registered with the U.S. Patent and Trademark Office (No. 1131999). Any unauthorized use is strictly forbidden.

. . . . . .